DOCUMENT RESUME

ED 059 680 HE 002 846

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TITLE Double Jeopardy and University Students in Wisconsin.
INSTITUTION Wisconsin Board of Regents of State Colleges, Madison.
PUB DATE 68
NOTE 18p.

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS Administrative Policy; *College Students; Due Process; *Equal Protection; *Higher Education; *Legal Problems; School Law; *Student Rights

ABSTRACT

This document addresses the question of students being put into a position of double jeopardy--if they commit a civil offense, they are subject not only to trial by the public courts but are also subject to punishment by their educational institution. As a general rule, colleges and universities should not prosecute students for acts subject to prosecution in courts, except where the student's acts are clearly threatening to the institution's existence, or inimical to its educational functions, processes, and objectives. Where necessary, colleges and universities can apply sanctions against students who have been charged or convicted in the courts for the same acts, without violating the state or federal constitutions. However, discipline should not be carried out capriciously in violation of the due process requirements of the 14th Amendment of the U.S. Constitution. University discipline that automatically follows civil court decisions is unreasonable and unjust. Automatic discipline violates the double-jeopardy concept held by the "man on the street," a concept which may be eventually embraced by the courts. (Author/HS)

ED 059680

DOUBLE JEOPARDY AND UNIVERSITY STUDENTS IN WISCONSIN

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HE 002 846

BOARD OF REGENTS OF STATE UNIVERSITIES

Madison, Wisconsin

1968

MEMORANDUM: DOUBLE JEOPARDY AND UNIVERSITY STUDENTS IN WISCONSIN

Two contemporary documents in Wisconsin's state systems of higher education,[1] and the latest review of a university student conduct case by a court of record,[2] give rise to a vexing constitutional question: Does the imposition of punishment by a university place the student in double jeopardy when proceedings in the courts have been initiated pursuant to the same act?[3]

The United States and Wisconsin State constitutions are seemingly clear and explicit. The Fifth Amendment to the Constitution of the United States provides "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life and limb", while the Constitution of the State of Wisconsin, Article I, Section 8, states that "No person for the same offense shall be put twice in jeopardy of punishment."

The revised By-Laws of the Wisconsin State Universities are equally unequivocal: "students are subject to such reasonable disciplinary action as the president of the university may consider appropriate, including suspension and expulsion in appropriate cases, for breach of federal, state, or local laws or university rules or regulations. This principle extends to conduct off campus which is likely to have adverse effects on the university or on the educational process or which stamps the offender as an unfit associate for the other students . . . Without limiting its generality by specification, the term "misconduct" as herein used shall include violation on campus of federal, state, or local law or by-laws of the Board of Regents of State Universities or university by-laws, rules, or regulations, including the prohibitory provisions of this by-law; and also violations of . . . laws, by-laws, rules or regulations occuring off campus . . . (emphasis added)".[4]

The chapter is rounded out with statements condoning due process, fairness, and discipline "reasonably commensurate with the gravety of the offense".

The "Crow Committee" report to the all-powerful University Committee of the faculty of the University of Wisconsin is blunter and even more to the point:

"There are certain situations in which the University should be free to impose sanctions in addition to or independent of sanctions imposed by civil authorities. In general, these involve direct danger to University personnel, serious damage to University property, and impairment of important University processes . . . regardless of whether state laws or city ordinances are also violated by the student conduct in question . . . the ultimate WSA (Wisconsin Student Association) position that whenever civil law applies to student behavior, the University has no rights whatever to use disciplinary sanctions, is too absolute to be acceptable . . . Duplication or supplementation of civil law penalties is normally undesirable and suggestive of double jeopardy . . . At the same time the University cannot be expected to eschew internal (i.e., disciplinary) procedures when its processes are seriously endangered (emphasis added)".5

All of this, in the words of the "Mermin Committee", adds to "a panopoly of sanctions for the same conduct . . . (creating a) confusing situation". Indeed, the "Mermin Committee" sees the possibility of a student violating a state law, a regent rule, and a faculty regulation by a single act and thereby exposing him to sanctions imposed by each of the three simultaneously.[6]

The most liberal of authoritative, contemporary statements by the American Association of University Professors, on what the relationship between civil and university jurisdiction ought to be, is in consonance with the two Wisconsin documents cited above. "Institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct from those of the general community should the special authority of the institution be asserted".[7]

The tradition of separate, special jurisdiction and punishment for college students arises in one respect from the very purpose of colleges and the necessity of maintaining good discipline in a simple and efficacious manner. In another respect it can be traced to the ancient and medieval origins of higher education. In Europe scholars were granted special privileges by the authority of empire, church, and state. "We find such privileges in Roman civil law of the first to fourth centuries as exemption from compulsory public duties, such as the quartering of soldiers and the rendering of military and jury service. In the eighth and ninth centuries the close association of scholars and clerics in monastery and cathedral schools lent the authority of canon law to the privileges heretofore claimed under civil law."[8] German Emperor Frederick I Barbarossa in 1158 granted the Authentica Habita "to all scholars" and with it the right of choosing between their professor's or the bishop's court.[9]

In America at Harvard, an institution founded in 1636 by the theocratic Bay Colony, the governing board, i.e., overseers, was evenly divided between clerical and secular members. Jurisdiction over students was also divided, the faculty having responsibility for minor students and the civil authorities having jurisdiction over adult students as well as over all "serious crimes".[10]

There is no record of any student at the Wisconsin State Universities ever being twice punished for a single act; however, the record of the University of Wisconsin-Madison contains a blemish to which concerned students point as a precedent reason for alarm: One Allen Riley, a freshman student threatened with hazing at the hands of sophomores in September, 1889, "dispersed his assailants" with a revolver.[11] Later, when attacked for a second time, he created such an uproar that several citizens came to his

assistance as a result of which the Madison police entered complaints against several students for riotous conduct.[12] "Before issuing warrants for the arrest of the students named, Municipal Judge Elisha W. Keyes decided to investigate the matter himself . . . Judge Keyes' investigation was brought to an abrupt halt when one of the students (Robert M. Long) who had been subpoenaed refused to be sworn."[13] Held in contempt of court he was subsequently suspended by the faculty.[14] At the same time four other students were suspended "on suspicion of having been implicated . . . (by) their refusal to testify in court in the hazing case because of possible self-incrimination".[15]

Twenty-two years later the Board of Regents wisely repealed the old rule that any student convicted in a local court of a crime, misdemeanor or disorderly conduct be automatically suspended from the University until readmitted by the faculty.[16] Unfortunately, neither students nor municipal authorities noted or believed that a change had been made. In 1914 university students stormed the Madison jail, in the biggest town-gown riot ever, on the assumption (among others) that if fellow students, then inside the jail, were convicted of a civil offense, they would be suspended or expelled from the University immediately.[17] Municipal authorities, under a similar impression, postponed the students' trial twice and then dropped the matter in consideration of a voluntary student subscription to pay for the damages. Presumably the city was "apprehensive about acting on its own because of the University penalties to the students which it considered harsh and overly severe."[18]

This sort of compasion for university students facing double jeopardy is not unique to Madison authorities. In 1966 the 47th District Court, Randall County, Texas, issued a writ of mandamus directing and commanding that the West Texas University permit a former student, Darrel

Aldridge, "to participate in all courses of instruction for which he was registered and all functions and activities to which his registration as a student would have entitled him," not withstanding the fact that he had been indefinitely suspended as a result of having been convicted of driving at excessive speed in the city of Canyon after having previously been put on probation for committing a similar offense on campus shortly theretofore. The Texas Court of Civil Appeals however reversed the trial court, thus upholding the University.[19]

The University of Wisconsin faculty seems to have neither a memory nor an understanding appreciation of history, for the "Crow Report" would set an academic penalty into effect as the automatic result of conviction of "minor property damage."[20] "Withholding academic credit" should never "follow automatically"from the decision of any regular civil, criminal, or student court! Even in medieval Bologna, where students did the hiring and firing of faculty, and in other respects operated the institution, the awarding of academic credit remained the right and prerogative of the faculty.[21]

In connection with the latest controversy at the University of Wisconsin, Robert Zwicker, a law student, voluntarily dropped out of school on November 29, 1967. Dean of Student Affairs, Joseph Kauffman, noted in Zwicker's record that he was "not in good standing." Zwicker was subsequently denied readmission. These actions were reportedly explained by Kauffman as due to Zwicker's arrests for activity against the war in Vietnam (by civil authorities),[22] and his alleged disruption of the hearings on cases against three other students who were expelled on a variety of charges of imparing University processes.[23] "To base punishment on a court case presently on appeal," his defense argues, "is to prosecute Zwicker in double jeopardy which is against just law practice."[24]

A somewhat analogous argument was used in a case growing out of the filthy speech movement at Berkeley. The California Court of Appeals (First District, Division 2), ruled that discipline imposed by the academic community amounted to a denial of a benefit and need not await the outcome of other proceedings. It was further held that: "denial of a benefit . . . can by no stretch of the imagination be classified as criminal proceedings" (thus forestalling possible claims of "double jeopardy"); the university, as an academic community, can formulate its own standards, rewards, and punishments to achieve its educational objectives; except for applicable constitutional limitations, the relationship between university rules and the laws of the outside community is entirely coincidental; and finally, that the academic community not only has a legitimate interest in resolving its disciplinary matters swiftly, but that, as noted in Dixon,[25] any other approach would be highly impractical and inconsistent with the functions of an educational institution.[26] This is the current persuasive law on student discipline and double jeopardy.

As a general rule it is doubtful whether any student will successfully stop or reverse disciplinary action by a college or university through the plea of double jeopardy. Indeed, the lack of empirical evidence that the issue of double jeopardy has been introduced in cases involving disciplinary action against students, by itself indicates that those who counsel student defendents on the law do not consider it a valid defense.[27] Nonetheless, the law lives, grows, and changes; therefore it may be instructive to review the principles on the basis of which courts deny defense under the double jeopardy clause, and to note any vulnerable points that may exist.

I. The double jeopardy prohibition "expresses a doctrine so ancient that it is impossible to trace its origin. It seems always to have been imbedded in every system of jurisprudence, as it is a part

"universal law of reason, justice, and conscience."[28] The legal doctrine on double jeopardy can be traced back to early English common law. As interpreted by Blackstone, it meant that no man's life should be put in jeopardy more than once for the same criminal offense.[29] In the United States, however, where two sovereigns define an act as a criminal offense, both or either the state and the federal governments can prosecute for the same act, and acquittal or conviction by one will not bind nor bar prosecution by the other.[30] Though vigorously denounced, this rule still stands.[31] In 1959 three U. S. Supreme Court Justices believed that the double jeopardy prohibition should apply to the state or the federal government whenever the other sovereign has first prosecuted for a single act.[32] Whether these dissents will eventually prevail remains to be seen.

It should be further noted that the double jeopardy provision of the United States Constitution applies only to offenses against, and to trials under, the laws of the United states.[33] The Constitution of the State of Wisconsin, however, has a double jeopardy provision which, according to the Wisconsin Supreme Court, constitutes "one of the most fundamental rights in our society,"[34] a right which "may not be brushed aside, even at the expense of the possibility that in a particular case a guilty person may be allowed to avoid punishment."[35]

Some courts assign sovereignty to cities,[36] despite the overwhelming opinion that they derive their powers from the states and are wholly creatures of the state.[37] In any case, public colleges and universities are generally recognized in this country as "developmental arms of the state,"[38]

II. A principle on the basis of which pleas of double jeopardy are denied in Wisconsin is that only the imposition of two criminal penalties is prohibited,[39] and only the sovereign (i.e., the state, not a city, county,[40]

or other arm or subdivision thereof) may pass an act defining a crime.[40] Thus in Wisconsin "civil" prosecution under an ordinance does not bar "criminal" prosecution under a statute;[41] indeed, both civil and criminal penalties may be imposed for the same act.[42]

Wisconsin State Statutes Section 939.12 defines a crime as "conduct which is prohibited by state law and punishable by fine or imprisonment or both." It is doubtful whether any discipline a college or university might impose would fit this description. Even though by chance a particular penalty may approach this definition, it would probably be considered a civil penalty, for action taken by school authorities is analogous to administrative remedial action or to action taken under municipal ordinances, both of which have been held to be "civil" not "criminal" in nature.[43]

There are those who see this distinction between "civil" and "criminal" actions as unnatural, arbitrary, and subject to change.[44] If the purpose of the action is to impose a criminal sanction, i.e., the deprivation of a right, and normal criminal procedure is followed, i.e., a complaint is issued, no answer is required of the defendant, the defendant pleads "guilty" or "not guilty", etc.,[45] one is led to see that "the 'criminal-civil' distinction is fictitious"[46] or at least subject to serious question.

III. Different acts committed at different times, though constituting similar offenses, may be subject to different trials.[47] On the other hand, a single act may be offensive against two different statutes in which case the defendant may be tried, found guilty, and punished for each offense.[48] In this connection, offenses are not the same, though relating to a single act, where there are distinct elements of proof and evidence in one which are not included in the other.[49] Application of the "same evidence rule", i.e., the drawing of a strict distinction between "act" and "offense(s)",

"provides a resourceful prosecutor with the potential for cumulation of punishment and avoidance of constitutional guarantees against double jeopardy."[50]

However, where crimes are so defined that a higher offense includes that which constitutes a lesser one, a conviction of the lesser offense bars prosecution for the higher.[51] Some states (a minority), it should be noted, are substituting the "same transaction test" for the "same offense test."[52]

Double jeopardy is a personal defense which a defendant can waive by asking for a new trial.[53] Though the state may not appeal from a trial court judgment of acquittal,[54] it may appeal rulings on questions of law without violating the double jeopardy provision.[55] Of course, these rules and tests are of interest to Wisconsin colleges and universities only in anticipation of possible changes in the definition of "crime."

IV. As a general rule colleges and universities should not prosecute students for acts subject to prosecution in courts,[56] nor "for engaging in such off-campus activities as political campaigning, picketing, or participating in public demonstrations"[57] except where the students' acts are clearly and dangerously threatening to the institution's existence and well-being, or inimical to its educational functions, processes, and objectives. Where necessary, colleges and universities can apply sanctions against students who have been charged and/or convicted in the courts, and for the same acts, without violating the state or federal constitutions. Discipline should not be carried out capriciously nor in violation of the due process requirements of the Fourteenth Amendment of the U.S. Constitution.[58] Notwithstanding the provisions of "model statutes" on college disciplinary hearings,[59]

students should be: (1) notified in writing of the charges against him, the names of the witnesses, and the facts to which each witness testifies; (2) given opportunity to present his own defense and call witnesses in his behalf; and (3) allowed to appeal to the Board of Regents.[60] While on one extreme, full adversary proceedings are neither desirable nor necessary (nor justly possible in the absence of power to subpoena, swear, and punish for perjury), on the other extreme, university discipline which <u>automatically</u> follows civil court decisions is unreasonable and unjust. Automatic discipline violates the double jeopardy concept held by the man on the street, a concept which may be eventually embraced by the courts.

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2. Goldberg, et. al. v. The Regents of the University of California, 248 ACA 1015, 57 Cal. Rptr. 463 (1967).

3. "California Court Decision Expected to be Leading Case on Student Discipline", Higher Education and National Affairs, Vol. XVI, No. 34 (October 6, 1967), pages 4 & 5.

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4. By-Laws, pages 4-6.

5. "Crow Committee" Report, pages 7, 9-10, 12, and 16.

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11. Sidney Dean Townley, Diary of a Student at the University of Wisconsin, 1886-1892 (Stanford: The University, mimeographed, 1939), pages 68 & 69.

12. "Is This Mr. Riley!" "Help! Murder! Help!", Wisconsin State Journal, Vol. 75, No. 50 (October 11, 1889), page 4.

13. Merle Curti and Vernon Carstensen, The University of Wisconsin, 1848-1925, 2 vols. (Madison: the University of Wisconsin Press, 1949), Vol. I, Pages 551 and 552.

14. The State ex Rel. Robert M. Long and another vs. Keyes, Judge, etc. 75 Wis. 288 (1889).

15. "University Affairs," Wisconsin State Journal, Vol. 75, No. 95 (December 5, 1889), page 4. According to the Wisconsin State Journal, "J." M. Long, a special student from Sun Prairie was cited for contempt of court while "A." M. Long, a special student from Sun Prairie subsequently was suspended. Inasmuch as the U.W. Registrar reports that no "A." M. Long was enrolled in 1889 (private communication, March 14, 1968), and considering that the "newspapers reported with brazen inaccuracy" (See Curti, Vol. I, page 551) we infer that "A." M. Long and "J " M. Long are the same person.

16. Curti, Vol. II, page 505.

17. "Many Hurt in Student-Police Riot, Student Mob Storms Police Station . . ." Wisconsin State Journal, Vol. 124 (October 6, 1914), No. 5, pages 1 & 3.

18. Doris M. Meissner, The University of Wisconsin Riot of 1914: Its History and Significance (Madison: The University of Wisconsin Department of Educational Policy Studies, xeroxed, 1968), pages 4 and 14.

19. James P. Cornette et. al. vs. Darrel Aldridge, 408 S. W. 2d 935 (Tex. 1966).

20. "Crow Committee" Report, pages 20-21.

21. "Wieruszowski, pages 62-73 and 163-172.

22. Zwicker vs. Boll, 270 F. Supp. 131 (U.S.D.C., W.D. Wis., 1967).

" 'You're Out' . . ." Page 1.

23. The Robert Zwicker Case . . ., page 1.

24. Rena Stenzor, page 1.

25. Dixon vs. Alabama State Board of Education, 294 F. 2d 150, (5th Cir. 1961).

26. Goldberg, page 476.

27. Alan W. Johnson, "Double Jeopardy: A Misnomer, the Relation of the Student to the College and the Courts," Journal of Higher Education, Vol. XXXVII, No. 1 (January, 1966), pages 17 and 18.

28. Mullins vs. Commonwealth, 258 Ky. 529, 530; 80 S. W. 2d 606,607 (1935).

29. Sir William Blackstone, Commentaries on the Laws of England, Book IV, ed. William G. Gammand (San Francisco: Bancroft-Whitney, 1890), pages 430-434.

30. 4 op. Wis. Atty. Gen. 979 (1915).

5 Op. Wis. Atty. Gen 906. (1916).

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31. J.A.C. Grant, "The Lanza Rule of Successive Prosecutions," 32 Col. L. Rev. 1309 (1932).

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43. State ex. rel. Milwaukee v. Newman, 96 Wis. 258 (1897).

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57. In addition to the text above, see American Civil Liberties Union, Academic Freedom and Civil Liberties of Students in Colleges and Universities (rev. ed., New York: The Union, 1963), page 11.

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